

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

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FILE: B-217101

DATE: February 25, 1985

MATTER OF: Connecticut Telephone & Electric
Corp.

DIGEST:

1. Where clause requiring listing of brand name of offered product in "Brand Name or Equal" procurement is omitted from the solicitation, bid that did not list brand name should not have been rejected as nonresponsive since contracting agency admits that award to that firm will meet the government's needs, and no other bidder would be prejudiced.
2. There is no legal basis for a bidder improperly rejected as nonresponsive to be given an award under another contract--the original contract having been completed--or to recover anticipated profits. Bid preparation costs may be awarded, however, since but for the improper action of the agency, the firm would have received the award.

Connecticut Telephone & Electric Corp. (Contelco) protests the award of a contract under invitation for bids (IFB) no. F41800-84-B-0160 issued by the Department of the Air Force. Contelco challenges the Air Force's determination that Contelco's low bid was nonresponsive.

We sustain the protest.

The solicitation was for various sizes and quantities of telephones. Although the solicitation stated that it was a "Brand Name or Equal Acquisition," and the schedule requested a brand name and model number, the clause that defines such a solicitation and states its requirements was neither included in the IFB nor incorporated by reference, as required by section 10.004 (b)(ii)(B) of the DOD Supplement to the Federal Acquisition Regulation, 48 C.F.R. § 210.004 (b)(3)(ii)(B) (1984). Contelco's bid was rejected as nonresponsive for failure to provide the brand name and descriptive information to demonstrate how the specifications would be met by the products it proposed to furnish, as required by the omitted clause. When award was made to the next low bidder, Contelco protested to the contracting officer, who denied the protest.

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Contelco argues that it purposely did not include individual brand names in its bid. Contelco states that, aside from the omission of the applicable clause, listing a particular brand name was no longer appropriate after an amendment to the solicitation was issued permitting new and completely remanufactured telephones to be offered, since remanufactured telephones include parts made by various manufacturers. Contelco maintains that as long as it agreed to offer products possessing the salient characteristics described in the solicitation, which it did by signing the bid, it would be responsive to the solicitation.

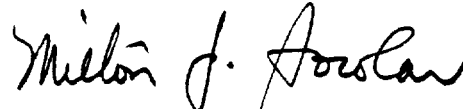
In responding to the protest, the Air Force states that it now believes Contelco's bid was responsive. The Air Force asserts that all bidders in fact competed on an equal basis, and that the brand name or equal purchase description together with the specifications contained in the salient characteristics provided adequate assurance that award to Contelco would have met the government's needs.

We see no legal basis to disagree with the Air Force's current position. The Air Force points out that by signing the bid, Contelco agreed to provide the items described in the specifications, and the agency is convinced that the government thereby could be assured of having its needs met. Further, there is no basis to believe that award under the IFB would have prejudiced anyone. In this respect, even assuming that the omission of the brand name or equal clause rendered the IFB defective, we often have stated that award may be made under a defective solicitation if the government's needs would be met and no other bidder would be prejudiced. See, e.g., GAF Corp., et al., 53 Comp. Gen. 586 (1974), 74-1 C.P.D. ¶ 68. We therefore agree that award to Contelco as low bidder could have been made, and that the rejection of Contelco's bid as nonresponsive was improper.

We have been informed by the Air Force that performance of the contract is complete, so we can make no recommendation regarding award. We do, however, believe that Contelco is entitled to recover its bid preparation costs. Contelco has demonstrated that but for the improper action on the part of the Air Force, it would have received the award. See Power Systems - Claim for Costs, B-210032.2, Mar. 26, 1984, 84-1 C.P.D. ¶ 344.

Contelco has requested that we direct award of a similar contract to Contelco at the bid price or reimburse it for its profits that would have been realized on this contract. Since we are without legal authority to grant either request, those requests are denied. See JT Systems, Inc., B-213999, Apr. 9, 1984, 84-1 C.P.D. ¶ 399; M.L. MacKay & Associates, Inc., B-208827, June 1, 1983, 83-1 C.P.D. ¶ 587.

The protest is sustained. Contelco should submit its claim for expenses incurred in the preparation of the bid directly to the Air Force.



Acting Comptroller General
of the United States